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Supreme Court, U.S.
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No. 03-188

IN THE

# Supreme Court of the United States

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; AND WESLEY S. SEMPLE, ON BEHALF OF THEMSELVES AND ALL OTHER NON-MEMBERS SIMILARLY SITUATED,

*Petitioners*,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; NATIONAL EDUCATION ASSOCIATION; AND SHALER AREA EDUCATION ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER LOCAL ASSOCIATIONS SIMILARLY SITUATED,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF *CERTIORARI*

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August 2003

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## QUESTIONS PRESENTED

I. Did a majority of the Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991), hold that the First Amendment proscribes compelling nonunion public employees to subsidize litigation that does not concern their bargaining unit, thereby requiring the court of appeals to follow that holding?

II. If the answer to question I is "no," is extra-unit litigation a constitutionally chargeable activity under the three-prong test announced in *Lehnert*, 500 U.S. at 519, *i.e.*, that it "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and 3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"?

III. Can public school teachers be required to pay the costs of representing public- and private-sector nurses absent factual findings of an "indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization"? *Id.* at 524.

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below. Petitioners believe that the party designated by an asterisk has no interest in the outcome of the petition.

> Marsha Otto; F. Naylor Emroy; Dennis A. Erb; Robert K. Gilbert; James W. Lossell; Barbara J. McAlley; Wesley S. Semple; Pennsylvania State Teachers Association; National Education Association; and Shaler Area Education Association.*

In addition to the parties listed above, Grove City Area Education Association ("GCAEA"), a local affiliate of the other defendant unions, was initially a party to the proceedings in the district court. Record ("R.") 1 (Complaint, ¶ 15). GCAEA was voluntarily dismissed from the action upon the filing of the Amended Complaint. R. 19; Appendix ("App.") A at 4a n.2.

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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Petitioners Marsha Otto, F. Naylor Emroy, Dennis A. Erb, Robert K. Gilbert, James W. Lossell, Barbara J. McAlley, and Wesley S. Semple respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on May 8, 2003.

## OPINIONS BELOW

The opinion of the court of appeals, App. A, *infra* 1a, is reported at 330 F.3d 125 (3d Cir. 2003). The opinion of the United States District Court for the Middle District of Pennsylvania, App. B, *infra* 28a, is reported at 107 F. Supp. 2d 615 (M.D. Pa. 2000). The report and recommendation of the magistrate judge, App. C, *infra* 51a, is reported at 1999 WL 177093, 161 L.R.R.M. (BNA) 2036 (M.D. Pa. 1999).

## JURISDICTION

The court of appeals initially entered judgment on April 3, 2003. Respondents timely sought rehearing. By order dated May 8, 2003, the court denied the petition for rehearing *en banc* but granted the petition for panel rehearing, vacated its earlier opinion and judgment, App. D at 67a, and issued an amended opinion and judgment. App. A at 1a. The time for petitioning for writ of certiorari runs from the later date. Thus, the petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 (West Supp. 2000), and the Pennsylvania Fair Share Act, 71 Pa. Stat. § 575. Their pertinent texts are set forth in Appendices E at 69a, F at 70a, G at 71a, and H at 72a, respectively.

## STATEMENT OF THE CASE

This case presents the question whether the First Amendment permits states to compel nonunion public employees to subsidize the affiliate expenses of their local union for: (1) litigation concerning other bargaining units; and (2) bargaining in other occupations throughout the public- and private-sectors. Respondents Pennsylvania State Education Association ("PSEA") and National Education Association ("NEA") have included such expenses in the agency fees charged Petitioners ("Nonmembers" or "Teachers").

This is a civil rights action under 42 U.S.C. § 1983 for violation of the Teachers' constitutional right not to be compelled to fund union activities not germane to the union's duties as exclusive bargaining representative, as this Court determined in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524, 528 (1991). App. B at 29a. Accordingly, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

### I. The Facts.

Petitioners are seven nonunion public school teachers who are represented for collective bargaining purposes by local teacher unions. Respondents are the state and national affiliates

of the local unions. Although the Teachers are not members of the unions, Pennsylvania law, 71 Pa. Stat. § 575, authorizes the seizure of agency fees from their wages.[1] Thus, Nonmembers are compelled to pay fees to the local and its state (PSEA) and national (NEA) affiliates. App. A at 3a-4a.

The affiliates' fees for the 1994-95 and 1995-96 school years included charges for litigation unrelated to the Teachers' bargaining units ("extra-unit litigation").[2] App. A at 4a.

Some PSEA affiliated locals represent public- and private-sector healthcare professionals, instead of teachers. Thus, PSEA provides representational services to education and healthcare professionals. PSEA does not allocate chargeable costs by profession. Instead, it includes the collective-bargaining expenses incurred for both education and healthcare employees in the fee charged Teachers. App. A at 25a. The "*Hudson* notices"[3] PSEA sent Nonmembers did not explain how the healthcare costs may ultimately inure to the Teachers' benefit by

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[1] Pennsylvania law limits nonmember fees to the amount expended for collective-bargaining purposes. Nonmembers are not required to object in order to avoid seizure of full union dues. 71 Pa. Stat. § 575(a).

[2] A stipulation chose 1994-95 as the test year, limited the litigation to the practices of PSEA and Shaler Area Education Association ("SAEA"), and established a formula through which the result would apply to the NEA. R. at 85; App. B at 31a. Thus, the facts and the discussion herein will not refer further to the NEA.

[3] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), established the "constitutional requirements for the Union's collection of agency fees," *id.* at 310, including "sufficient information to gauge the propriety of the union's fee." *Id.* at 306. This explanation is often referred to as a "*Hudson* notice."

virtue of their local's affiliation with PSEA. R. 19 (Amended Complaint, Exhibit A).

**II. The Proceedings Below.**

On July 2, 1996, Marsha Otto and six other teachers filed this suit alleging that the unions: (1) included expenditures in the fee that are constitutionally proscribed under *Lehnert*, 500 U.S. at 524, 528; and (2) did not comply with "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 307 & n.18, 310. After the district court confirmed that the Teachers had standing to challenge the unions' fee calculation and the sufficiency of the unions' *Hudson* notice, but not the timeliness of the unions' "arbitration" process, the parties partially settled, dismissing all claims other than the Teachers' claims for declaratory and injunctive relief on three matters. App. A at 4a-5a; App. C at 51a-54a.

The parties then filed a joint stipulation of facts followed by cross-motions for summary judgment on the Teachers' contentions that: (A) *Hudson* requires SAEA's calculation of its agency fee to be verified by an independent auditor ("the notice claim"); and (B) *Lehnert* prohibits PSEA from charging objecting teachers: (1) for extra-unit litigation expenditures; and (2) for expenditures for the representation of healthcare professionals ("the chargeability claims"). App. B at 31a. Only the *Lehnert* chargeability claims involving extra-unit litigation and healthcare representation are relevant to this Petition.

The cross-motions were referred to a magistrate judge who recommended judgment for the Teachers on their first chargeability claim and against them on their second. App. B at 31a-32a. With regard to the first claim, the magistrate found that objecting nonmembers cannot be charged for extra-unit

litigation. He determined that Justice Blackmun in *Lehnert*, 500 U.S. at 528, expressly said extra-unit litigation is nonchargeable, and that "Justice Scalia, concurring in part, reached the same result by application of a different rationale. ('I would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent. [*Id.*] at 550.'[)]." App. C at 63a. Accordingly, the magistrate held that this "issue has been determined by the United States Supreme Court." *Id.* at 64a.

In contrast to the first claim, the magistrate judge found that expenditures for public- and private-sector healthcare workers did not involve "a direct application of a binding precedent." *Id.* Instead, he felt the chargeability of such expenses was a "highly factual question of relatedness as between bargaining activities and the various employee categories." *Id.* at 64a-65a. He then held that the Teachers had the burden of proof on this issue, and that the stipulated record did not provide the necessary facts for them to prevail. *Id.* at 66a. The parties filed objections to the magistrate judge's report and recommendation. App. B at 32a.

The district court overruled all objections and adopted the magistrate judge's report and recommendation in its entirety, entering judgment accordingly. R. 179 (Judgment); App. B at 48a-50a.

As to extra-unit litigation expenditures, although the district court found that the opinions of Justice Blackmun and Justice Scalia each garnered the concurrence of a total of only four Justices, together the opinions "tipp[ed] the scales in [the Teachers'] favor on this issue." App. B at 42a. The significant factors for the district court were this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (extra-unit litigation

nonchargeable under the Railway Labor Act ("RLA")), and Justice Scalia's construction in *Lehnert*, 500 U.S. at 555, that *Ellis*' holding on extra-unit litigation "'merely reflect[s] the constitutional rule.'" App. B at 43a.

As to the other chargeability issue, the district court held that the Teachers had the burden of showing that PSEA's representation of healthcare professionals does not meet *Lehnert*'s three-prong test for chargeability. The court ruled that the stipulated evidentiary record did not provide sufficient facts to determine whether such activities meet the *Lehnert* test. "Consequently, those facts do not support the conclusion that the [Teachers'] constitutional rights relating to that claim have been violated." *Id.* at 46a.

The parties cross-appealed, and both chargeability issues were presented to the Third Circuit. The court reversed in part, holding that the costs of both extra-unit litigation and representation of public- and private-sector healthcare professionals are chargeable to the Teachers. App. A. at 5a-6a.

Noting that *Ellis*, 466 U.S. at 453, held that "[t]he expenses of litigation not having such a connection with the [nonmembers'] bargaining unit are not to be charged to objecting employees," the Third Circuit refused to follow *Ellis* because it speculatively doubted that: (1) the litigation expenses in *Ellis* were "incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement;" and (2) the *Ellis* Court "intended to state a *per se* rule against the chargeability of extra-unit litigation expenses." App. A at 18a-19a.

Next, the Third Circuit agreed that Justice Blackmun's plurality of four held that "dissenting employees may not be charged for the costs of union literature reporting on extra-unit litigation because they cannot be charged for such litigation

itself under *Ellis*." App. A at 20a. But the court held that Justice Scalia, who concurred in part and dissented in part, did not "apply his preferred test to the question whether dissenting employees could be charged . . . (for the expenses of extra-unit litigation itself)." *Id.* at 21a. The court found Justice Scalia's silence "inconclusive."[4] *Id.* at 22a.

Declaring itself free from any "definitive Supreme Court guidance," *id.*, the Third Circuit then applied *Lehnert*'s three-prong chargeability test and decided that extra-unit litigation expenses are chargeable to the Teachers. "Unlike the Justice Blackmun camp in *Lehnert*, we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses." *Id.* at 25a.

Addressing the Teachers' second claim–that there was no showing that the expenses for representing private- and public-sector healthcare professionals could inure to the Teachers' benefit, the Third Circuit agreed that the district court "improperly placed the burden of proof on the [Teachers] when it belonged on the Unions." *Id.* at 26a. Nevertheless, it affirmed on the basis of other reasoning. *Id.* at 27a & n.17. The court found that pooling costs across occupational groups meets

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[4] The Third Circuit recognized that if five justices in *Lehnert* had agreed "that extra-unit litigation is not chargeable to nonunion employees, *Lehnert* would control here." App. A at 21a. Accordingly, the court acknowledged that this decision conflicts with: (1) the Tenth Circuit's holding in *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1130 n.4 (10th Cir. 1991), that a majority in *Lehnert* would treat extra-unit litigation expenses as nonchargeable; and (2) the Sixth Circuit's finding in *Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995), that a majority in *Lehnert* had approved the charging of extra-unit litigation costs because they were pooled expenses. App. A at 22a n.16, 23a, 25a.

*Lehnert*'s general standard for extra-unit activities because "there is 'some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 26a (quoting *Lehnert*, 500 U.S. at 524).

## REASONS FOR GRANTING THE WRIT

Each decade this Court has regularly addressed issues concerning the chargeability of union expenses to objecting nonmembers, either under the First Amendment, or to avoid serious doubts as to the constitutionality of a monopoly bargaining statute. *See Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). However, since *Lehnert*, the lower courts are in disarray over the Court's 1991 "definitive" *Lehnert* decision.

"Because of the importance of the issues," *Lehnert*, 500 U.S. at 514, this Court granted certiorari to decide whether objecting nonmembers could constitutionally be compelled to subsidize six types of union activities The Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

Justice Blackmun recognized two exceptions to his conclusion "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associ-

ated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Id.* at 524. The two exceptions are that:

> [(1) t]his rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit, . . . .

*id.* at 528 (plurality opinion);[5] and

> [(2) t]his conclusion, however, does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. . . . There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.

*Id.* at 524 (opinion of the Court).

Since *Lehnert*, there has been confusion in the lower courts: (1) whether the Court held that the First Amendment prohibits the use of dissenters' fees for extra-unit litigation, and, thus, binds the courts of appeals,[6] and (2) if not, whether extra-unit litigation satisfies *Lehnert*'s three-prong chargeability test. Additionally, the lower courts have failed to articulate standards

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[5] Justice Scalia, concurring and dissenting in part, explicitly relied on *Ellis*' holding, 466 U.S. at 453, that extra-unit litigation is not chargeable and found the holding "reflect[s] the constitutional rule suggested in *Hanson* and later confirmed in *Abood*." *Lehnert*, 500 U.S. at 555.

[6] There has also been confusion on whether the Court previously had held the same thing in *Ellis*, 466 U.S. at 453.

for always accepting that the expenditure of dissenters' funds for bargaining activities unrelated to their unit "may ultimately inure to the benefit of" that unit. *Id.*

A number of circuits have found it difficult to determine *Lehnert*'s "rule of law" on extra-unit litigation. In *Bromley v. Michigan Education Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996), the Sixth Circuit explained that "[w]hether the objecting employee can be required to contribute to the cost of [extra-unit] litigation proved to be a difficult question for our panel in light of the Supreme Court's fractured decision in *Lehnert*."[7] The Tenth Circuit recognized that because the specific section of Justice Blackmun's opinion in *Lehnert* dealing with extra-unit litigation "was not adopted by a majority of the Court, some uncertainty may remain as to whether the Constitution forbids charging dissenting employees for extra-unit litigation."[8] *PAID*, 938 F.2d at 1130. Judge Silberman of the District of Columbia Circuit complained that he did not understand the basis for the exceptions to the general rule. "[W]hen assessments have been levied for expenditures relating to activities at another bargaining unit, it is impossible to detect in the Supreme Court cases –particularly *Lehnert*–a principled basis for distinguishing expenditures that are 'germane' from those that are not." *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring dubitante). Consequently, he

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[7] *See also Reese*, 71 F.3d at 623 (*Lehnert*'s application of the chargeability test to specific activities, including extra-unit litigation, is "less than clear").

[8] Nevertheless, the court found that "a majority of the Supreme Court would not allow [the union] to charge these litigation expenses to the [objectors]." *PAID*, 938 F.2d at 1130 n.4.

solicited further guidance from this Court: "[S]urely the Court can give us some principles on which to base our decisions." *Id.*

This confusion and lack of Supreme Court guidance enabled the Third Circuit to depart from the Court's holdings "regarding what the First Amendment will countenance in the realm of union support."[9] *Lehnert*, 500 U.S. at 516.

## I. There Is a Conflict Among the Circuits and the State Courts As to Whether a Majority of the Court in *Lehnert* Held That the First Amendment Prohibits the Use of Dissenters' Fees for Extra-Unit Litigation.

The Third Circuit's conclusion that there was no *Lehnert* majority on extra-unit litigation conflicts with decisions of the Tenth Circuit, a substantial minority of the Fourth Circuit, and the Indiana Supreme Court. On the other hand, the Sixth Circuit and the Wisconsin Supreme Court have adopted the Third Circuit's view that *Lehnert* did not provide any binding authority on the issue of extra-unit litigation.[10]

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[9] This Court has repeatedly recognized the significant constitutional interests involved in compelling employees to support a union. "To force employees to contribute, albeit indirectly, to the promotion of [a wide range of social, political, and ideological viewpoints] implicates core First Amendment concerns." *Lehnert*, 500 at 516. "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222.

[10] The Third Circuit's additional view that *Ellis*, 466 U.S. at 453, does not state a *per se* rule against the chargeability of extra-unit litigation expenses conflicts with decisions of the First and Tenth Circuits, a minority of judges of the Fourth and District of Columbia Circuits, the Wisconsin Supreme Court, and the National Labor Relations

(continued...)

The Tenth Circuit was the first circuit to consider, post-*Lehnert*, whether nonmembers may be compelled to pay for extra-unit litigation. The court noted that its holding that extra-unit litigation costs are not chargeable "is **bolstered** by the recent *Lehnert* decision." *PAID*, 938 F.2d at 1130 (emphasis added). It recognized that the "section of Justice Blackmun's opinion [on extra-unit litigation] was not adopted by a majority of the Court." *Id.* The Tenth Circuit, nonetheless, concluded, based on its reading of Justice Scalia's opinion in *Lehnert*, 500 U.S. at 555, 562 (Scalia, J., concurring in part and dissenting in part), "that a majority of the Supreme Court would not allow [the union] to charge [extra-unit] litigation expenses to the plaintiffs." 938 F.2d at 1130 & n.4.[11]

Extra-unit litigation expenditures also were challenged in *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295 (4th Cir. 1993).

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[10](...continued)
Board. *See infra* at 12-15. No other court of appeals or state supreme court has adopted the Third Circuit's view of *Ellis*. Although *Ellis* was a statutory case under the RLA, 45 U.S.C. § 152, Eleventh, like other RLA dues cases, the decision is: (1) "instructive in delineating the bounds of the First Amendment;" (2) provides "some guidance regarding what the First Amendment will countenance in th[is] realm," *Lehnert*, 500 U.S. at 516; and (3) "reflect[s] the constitutional rule," *id.* at 555 (Scalia, J., concurring in part and dissenting in part); *accord Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1516 (10th Cir. 1996).

[11] The Tenth Circuit also relied on *Ellis*, 466 U.S. at 453, in holding that objecting employees cannot be charged for extra-unit litigation. The court expressly rejected the "contention that the Supreme Court did not mean what it said in *Ellis*." *PAID*, 938 F.2d at 1130. "Under *Ellis*, the expenses of any other litigation that does not directly concern [dissenters'] bargaining unit must also be excluded." *Id.* at 1131.

There five judges[12] of the *en banc* Fourth Circuit vigorously dissented from the majority's holding that the issue was not properly preserved for review.[13] Every judge reaching the issue had no doubt that this Court's decisions hold extra-unit litigation expenditures nonchargeable. "In *Ellis* and *Lehnert*, the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ('extra-unit litigation'), were not chargeable against the dissenter." 992 F.2d at 1304 (Russell, J., dissenting) (citations omitted); *see also id.* at 1312, 1316.

These five judges rejected the argument that Justice Scalia was silent about extra-unit litigation, and thus there was no binding decision of this Court. Instead, the judges noted that Justice Scalia began his opinion by stating that he "would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent. *Lehnert*, 500 U.S. at 550 (Scalia, J., dissenting)." Then the judges held that "supporting litigation in other units is not a 'duty' that the [statute] required the union here to perform." *Crawford*, 992 F.2d at 1316 (Russell, J., dissenting).[14]

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[12] Judges Russell, Widener, Niemeyer, Hamilton and Luttig. *Crawford*, 992 F.2d at 1303, 1318.

[13] Having found the issue not properly preserved, the panel majority "express[ed] no view about it." *Crawford*, 992 F.2d at 1301.

[14] Extra-unit litigation expenditures have not been considered by the District of Columbia Circuit. Nevertheless, Judge Silberman discussed this Court's holdings on that issue. While seeing inconsistency, he recognized that this Court "has held that non-members cannot be charged . . . for litigation expenses not directly associated with their collective bargaining unit (the latter since the Supreme Court

(continued...)

Similarly, while the Indiana Supreme Court recognized that Justice Scalia's concurring and dissenting opinion did not constitute the opinion of the Court on the extra-unit litigation issue, it did find that Justice Scalia's opinion **and** "the judgment of the Court in *Lehnert*" do "no[t] allow[] nonunion members to be charged for extra-unit litigation." *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), ***adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich***, 594 N.E.2d 781 (Ind. 1992).

The National Labor Relations Board has also accepted that the Court in *Ellis* and *Lehnert* "held [extra-unit litigation] expenses nonchargeable to objectors." *California Saw & Knife Works*, 320 N.L.R.B. 224, 238 (1995).[15] This fact was noticeably omitted from the Third Circuit's discussion of the NLRB's

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[14](...continued)
understands such litigation to be 'political')." *Beckett*, 59 F.3d at 1281, citing *Ellis*, 466 U.S. at 448, and *Lehnert*, 500 U.S. at 507, 519-22, 528, *id.* at 555 (Scalia, J., concurring in the judgment).

Similarly, the First Circuit concluded that *Ellis*, 466 U.S. at 453, "said that the union could not compel payment for litigation expenses not arising out of the contract or not normally conducted by an exclusive bargaining agent, despite the fact that there could be some indirect benefit to union members." *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 299 (1st Cir. 2000).

[15] The Board did not follow these holdings because they "were premised on constitutional considerations," and "precedent grounded in constitutional considerations [are not] binding in the context of the NLRA." *California Saw*, 320 N.L.R.B. at 238.

treatment of extra-unit litigation and the Seventh Circuit's enforcement of the Board's order.[16] App. A at 23a.

The Wisconsin Supreme Court felt Justice Scalia's failure to "directly address" extra-unit litigation meant "there is no majority holding on this issue in *Lehnert*." *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992). Nevertheless, it found that *Ellis* "held that . . . extra-unit litigation expenses . . . failed the first [*Lehnert*] test–neither was sufficiently related to the unions' duties as exclusive bargaining representative to be chargeable." *Id.* at 385. Accordingly, it found extra-unit litigation nonchargeable. "[W]e find Justice Blackmun's plurality opinion persuasive. Moreover, it may be inferred from Justice Scalia's discussion of *Ellis* and from other early [agency fee] cases that a majority of the Court would find extra-unit litigation expenses nonchargeable." *Id.* at 388.

Contrary to these courts, the Third and Sixth Circuits have concluded that there is no binding decision of this Court on extra-unit litigation expenditures **and** have held extra-unit litigation expenses chargeable to objecting nonmembers. The Sixth Circuit concluded that *Lehnert* "did not have a holding on [the extra-unit litigation] issue" because "Justice Marshall correctly observed that the issue of chargeability of [these] costs was not properly before the Court," and "a majority approved of charges for pooled expenses." *Reese*, 71 F.3d at 623-24.

The Sixth Circuit's reliance on Justice Marshall, who dissented on this issue, is suspect. Where the majority has

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[16] In enforcing the Board's order, the Seventh Circuit, without any analysis, cryptically stated that litigation expenditures are "analytically identical, as far as we can see" to all other extra-unit expenditures. *Machinists v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998).

spoken, dissenting opinions are "of course, entitled to no weight as a precedent." *United States v. Harpole*, 263 F.2d 71, 80 (5th Cir. 1959). More important, the court did not discuss either *Ellis*, *Lehnert*'s three-prong chargeability test, or Justice Scalia's *Lehnert* opinion in making its "snap judgment" that there is no holding from this Court concerning the chargeability of extra-unit litigation. Indeed, *Ellis* is cited nowhere in the Sixth Circuit's decision, let alone on this issue to which *Ellis* had specifically spoken.[17]

Similarly, the Third Circuit refused to follow this Court's holdings on extra-unit litigation because it believed that Justice Scalia's opinion was silent on the issue, and thus "his silence is inconclusive." App. A at 22a. Having disclaimed the existence of Justice Scalia's position on this issue, the panel was "left without definitive Supreme Court guidance," *id.*, and thus free to concoct its own result.

There is widespread confusion among the lower courts over Justice Scalia's – **and, thus, the Court's** – position on extra-unit litigation. That there is such confusion is mystifying because this Court has provided the lower courts guidance in following

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[17] Earlier, a Sixth Circuit panel (including two judges from the *Reese* panel) declined to resolve whether Justice Scalia's concurrence/dissent, which was joined by three other Justices, implicitly joined Justice Blackmun's plurality or Justice Marshall's dissent. Nevertheless, this panel concluded that Justice Scalia did not reach the extra-unit litigation issue, and, thus, "*Lehnert* did not *clearly* hold extra-unit . . . litigation nonchargeable." *Jibson v. Michigan Educ. Ass'n-NEA*, 30 F.3d 723, 732 (6th Cir. 1994) (emphasis in original). That panel, too, inexplicably ignored *Ellis*.

and applying fragmented decisions.[18] Nevertheless, as demonstrated above, the confusion exists, and this Court should exercise its supervisory power to resolve that confusion.

### A. Justice Scalia Concurred in the *Lehnert* Judgment That Reversed the Chargeability of Extra-Unit Litigation.

It is clear that Justice Scalia, joined by Justices O'Connor and Souter,[19] concurred in the *Lehnert* judgment reversing the Sixth Circuit's holding that extra-unit litigation costs are chargeable to objecting nonmembers. **First**, Justice Scalia's "statutory duties" test presents narrower grounds for chargeability than Justice Blackmun's three-prong analysis. *Lehnert*, 500 U.S. at 558 (Scalia, concurring in part, dissenting in part). For instance, under the three-prong analysis, miscellaneous professional activities, *id.* at 529; local delegate expenses to attend conventions of the local's state and national affiliates, *id.* at 529-30; and threats of or preparation for illegal strikes are chargeable, *id.* at 530-31. However, under Justice Scalia's "statutory duties" test these activities are not chargeable. *Id.* at

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[18] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citation omitted).

[19] Although Justice Kennedy joined Justice Scalia's opinion, 500 U.S. at 550-62, Justice Kennedy wrote separately, *id.* at 562-64, to make clear that he did not agree with Justice Blackmun's removal of litigation from the scope of the Court's holding that the "otherwise chargeable" extra-unit expenses of affiliate unions may be charged nonmembers. *Id.* at 563-64. This provides additional evidence that Justice Scalia agreed with Justice Blackmun on this issue.

559-60, 562. It is only logical to assume that Justice Scalia's silence as to other activities discussed by Justice Blackmun means Justice Scalia concurred in Justice Blackmun's judgment, not dissented, as to those activities. This conclusion is further supported by the fact that Justice Scalia dissented only from Justice Blackmun's chargeability findings, not his **non**chargeability determinations.

**Second**, Justice Scalia explicitly relied on *Ellis*' holding on extra-unit litigation to support his "statutory duties" test:

> [E]xpenses for litigation "seeking to protect the rights of airline employees generally" could not be charged, but only those for litigation "incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit," and "other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative."

*Lehnert*, 500 U.S. at 555 (quoting *Ellis*, 466 U.S. at 453) (Scalia, concurring in part, dissenting in part). Justice Scalia then treated *Ellis* "as merely reflecting the constitutional rule suggested in *Hanson* and later confirmed in *Abood*." 500 U.S. at 555. The Wisconsin Supreme Court found that these facts demonstrated that "a majority of the Court would find extra-unit litigation expenses nonchargeable." *Browne*, 485 N.W.2d at 388.

Justice Marshall, dissenting from *Lehnert*'s holding on extra-unit litigation,[20] also disagreed with Justice Scalia's reliance

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[20] "I also disagree with **the Court's decision** that the costs of articles . . . about union litigation outside petitioners' bargaining unit are not chargeable." *Lehnert*, 500 U.S. at 534 (Marshall, J., dissenting)

(continued...)

on *Ellis* and its statement of the constitutional rule. *Ellis*, "in my view, is not controlling here. . . . [N]othing in the [*Ellis*] Court's discussion of extra-unit litigation . . . suggests a constitutional rather than statutory basis for excluding these particular costs." *Lehnert*, 500 U.S. at 548-49 (Marshall, J., dissenting). Justice Marshall clearly recognized that Justice Scalia's reliance on *Ellis* and treatment of *Ellis* as stating the constitutional rule, meant that Justice Scalia's opinion opposed Justice Marshall's view that extra-unit litigation costs are chargeable. *See Albro*, 585 N.E.2d at 673 ("Justice Scalia's concurring and dissenting opinion . . . [does] no[t] allow[] nonunion members to be charged for extra-unit litigation."). Otherwise, Justice Marshall would have written the opinion of the Court on this issue and not dissented.

**Third**, Justice Scalia stated that the first prong of Justice Blackmun's chargeability test–expenses must be germane to collective-bargaining activity–"could, if properly elaborated, stand for" his "statutory duties" test. However, he found that "the manner in which the Court applies it to the expenditures before us here demonstrates that the Court" applied it too broadly and allowed chargeable expenditures that are not chargeable under his "statutory duties" test. *Lehnert*, 500 U.S. at 557. He never complained that Justice Blackmun found something nonchargeable that should have been chargeable. "I readily conclude that a number of the challenged expenses

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[20](...continued)
(emphasis added). "I respectfully dissent from **the Court's conclusion** that the three types of charges discussed above [lobbying, public relations and extra-unit litigation] may not be included in the service fees." *Id.* at 550 (emphasis added).

**cannot** be charged to the nonmembers." *Id.* at 558 (emphasis added).

Justice Blackmun found extra-unit litigation to be nonchargeable precisely because it is "not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, . . . we hold that the Amendment proscribes such assessments in the public sector." *Id.* at 528. It would indeed be perverse to believe that Justice Scalia's "silence" means that he did not support Justice Blackmun's finding that extra-unit litigation is not germane and its nonchargeability is required by the Court's previous holding in *Ellis*.[21]

That Justice Scalia does not mention extra-unit litigation in his list of chargeable extra-unit services that affiliated organizations may provide, *Lehnert*, 500 U.S. at 561, further shows that Justice Scalia concurred in Justice Blackmun's conclusion that the unanimous rationale that supports the chargeability of most "otherwise chargeable" extra-unit activities "does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit." *Id.* at 528.

**Fourth**, Justice Scalia distinguished between collective-bargaining services provided by affiliated organizations that may improve the outcome of negotiations, for which he would permit the union to charge, and those that "do so through some means other than the bargaining process," for which he would

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[21] Both the Indiana and Wisconsin Supreme Courts concluded that extra-unit litigation fails the first aspect of the *Lehnert* test because "it is not germane to the collective bargaining activity of the local union." *Browne*, 485 N.W.2d at 388; *accord Albro*, 585 N.E.2d at 673.

not. *Id.* at 561 n.4; *see also id.* at 559 (public relations and lobbying, "though they may certainly affect the outcome of negotiations, are not part of this collective-bargaining process"). Clearly, extra-unit litigation by definition is outside the bargaining process in the dissenter's bargaining unit.[22]

As noted earlier, there is widespread confusion among the lower courts over Justice Scalia's–**and, thus, the Court's**–position on extra-unit litigation. Thus, the location of one's employment now determines whether extra-unit litigation expenses are chargeable to nonmembers, not the uniform decision of this Court. In the other circuits, uncertainty and confusion are likely to continue as those circuits are forced to parse Justice Scalia's position on extra-unit litigation. An individual's First Amendment rights should never depend on geography or uncertainty twelve years after a supposedly definitive ruling of this Court. Therefore, this Court should exercise its supervisory power by granting a writ of certiorari on this issue and ending the confusion and uncertainty.

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[22] The Third Circuit rejected the Teachers' interpretation of Justice Scalia's opinion as inconclusive, App. A at 22a, but then speculated that Justice Scalia's chargeability standard might be applied in such a way as to find "a local bargaining unit's *pro rata* share of pooled litigation expenses" chargeable. *Id.* at 22a n.16. However, Justice Scalia always limited his support of the chargeability of extra-unit activities to the affiliates' "on-call services for use **in the bargaining process.**" *Lehnert*, 500 U.S. at 561 (emphasis added).

## II. The Third Circuit's Decision That Unions Constitutionally May Compel Objecting Nonmembers to Pay for Extra-Unit Litigation Fails *Lehnert*'s Three-Prong Chargeability Test.

Assuming *arguendo* that there is no majority holding in *Lehnert* on extra-unit litigation expenditures, the Third Circuit's application of *Lehnert*'s three-prong chargeability test conflicts with relevant decisions of this Court. Its result also conflicts with numerous lower courts.[23] The Third Circuit found extra-unit litigation chargeable because it treated a different test, the "enure to the benefit" test, 500 U.S. at 524, as the equivalent to the three-prong chargeability test, *id.* at 519. App. A at 24a-25a. It thus decided this important federal question in a way that conflicts with the relevant decision of this Court in *Ellis* and *Lehnert*.

The Third Circuit found extra-unit litigation costs meet the first prong, germane to collective bargaining, "[b]ecause the extra-unit litigation expenditures at issue ensure the availability

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[23] To be fair, as shown in Section I, *supra*, the other lower courts found themselves bound by the Court's *Ellis* and/or *Lehnert* holdings on the nonchargeability of extra-unit litigation. Although they mentioned the three-prong test, they did not apply it in a vacuum. Only the Third Circuit found itself "left without definitive Supreme Court guidance," App. A at 22a, and applied the three-prong test as it saw fit. On the other hand, the Sixth Circuit, the only other circuit to uphold the chargeability of extra-unit litigation, erroneously found that a majority of the Court approved of charging for pooled litigation expenses. *Reese*, 71 F.3d at 626. Although the Third Circuit correctly found that "*Reese* overstates *Lehnert*'s holding, as the *Lehnert* majority never held extra-unit litigation expenses incurred pursuant to a pooling agreement to be chargeable," it "nonetheless agree[d] with the Sixth Circuit's conclusion." App. A at 23a.

of resources for collective-bargaining-related litigation." App. A at 24a. However, like lobbying and public relations activities, which Justice Scalia specifically agreed with Justice Blackmun are not chargeable (although each used a different chargeability test), *Lehnert*, 500 U.S. at 558-59, extra-unit litigation is "no[t] part of this collective-bargaining process," *id.* at 559 (Scalia, J.), even though "precedent established through litigation on behalf of one unit may ultimately be of some use to another unit," *id.* at 528 (Blackmun, J.).

Applying the second prong of the *Lehnert* test, the Third Circuit simply noted "that the free-rider concerns applicable to other pooled-expense arrangements apply with-equal force to extra-unit litigation expenditures," but offered no other justification. App. A at 24a. Because the Third Circuit ignored the political and expressive nature of litigation, it erroneously failed to find that litigation fails the second prong, as lobbying and other political activities do.

The governmental interests underlying this Court's acceptance of forced-unionism schemes are "promoting labor peace and avoiding the 'free-rider' problem that would otherwise accompany union recognition." *Lehnert*, 500 U.S. at 520-21. Neither goal is served by charging objecting employees for lobbying, electoral, and other political activities, including extra-unit litigation, which do not relate to their collective-bargaining agreement. Labor peace is not served because, "unlike collective-bargaining negotiations between union and management," the courts, like legislatures, the media, and other platforms of public discourse, "are public fora open to all." *Id.* at 521. Moreover, the "free-rider" concern is inapplicable where litigation, like lobbying, "extends beyond the effectuation of a collective-bargaining agreement." *Id.*

The Third Circuit found that extra-unit litigation expenses pass *Lehnert*'s third prong, because "pooled litigation resources are expended on collective-bargaining-related activities," and thus meet the "may ultimately inure to the benefit" test imposed by the Court for extra-unit activities. App. A at 25a. However, the third prong (not adding to the burden of free speech) and the "may ultimately inure to the benefit" test are not interchangeable.

Justice Blackmun recognized that just because something may pass the "inure to the benefit" test does not mean that it will pass the Court's three-prong chargeability test. He conceded that extra-unit litigation may ultimately inure to the benefit of the bargaining unit, *Lehnert*, 500 U.S. at 528. Nonetheless, he still found it nonchargeable, because it is speech and association that is both political and public in nature. *Id.*

Moreover, the third prong applies to communicative content outside of the union, while nonideological conduct within the union or between the union and the employer are analyzed under the more lenient "may ultimately inure to the benefit" test. See *Crawford*, 992 F.3d at 1314-15, 1317 (Russell, J., dissenting). Litigation, which by definition is outside the union and involves third parties in addition to the union and the employer, can never be analyzed under the "inure to the benefit" standard, but must always be analyzed under the three-prong test.

Forced funding of political and ideological speech outside the union-employer context or the collective-bargaining process is an additional burden to free speech beyond that inherent in the allowance of the agency shop. *Lehnert*, 500 U.S. at 521-22,

524.[24] However, the court refused to recognize that all litigation has an "important political and expressive nature" and is "more akin to lobbying in both kind and effect." *Id.* at 528, citing *NAACP v. Button*, 371 U.S. 415, 431 (1963).[25] "[T]he Supreme Court ha[s] been particularly chary of treating as germane union expenditures that touch the political world." *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422 (D.C. Cir. 1997) (citing *Lehnert* and *Ellis*), *aff'd*, 523 U.S. 866 (1998). Therefore, extra-unit litigation is a continuation of the political process, not the collective-bargaining process. *See Beckett*, 59 F.3d at 1281 (Silberman, J., concurring).

The Third Circuit's application of these tests to determine whether the First Amendment allows the state to compel payment for extra-unit litigation conflicts with the definitive decisions of this Court. Thus, this Court should grant certiorari to decide whether the Third Circuit properly applied *Lehnert*'s three-prong chargeability test to extra-unit litigation.

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[24] [A]llowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present 'additional interference with the First Amendment interests of objecting employees.' *Ellis*, 466 U.S. at 456. . . . The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context.

*Lehnert*, 500 U.S. at 521, 522. "[W]e find extraunit litigation to be more akin to lobbying in both kind and effect. We long have recognized the important political and expressive nature of litigation." *Id.* at 528.

[25] "As Justice Blackmun recognized, an association for litigation often constitutes the most effective form of political association." *PAID*, 938 F.2d at 1131.

## III. The Third Circuit's Decision That Affiliated Unions May, As a Matter of Law, Charge Nonmembers for Their Pooled Costs Across Occupational Groups Conflicts with Decisions of Other Courts of Appeals and State Supreme Courts.

The Third Circuit correctly found that "the District Court improperly placed the burden of proof on the plaintiffs when it belonged on the Unions. As *Lehnert* points out, '[t]he union [bore] the burden of proving the proportion of chargeable expenses to total expenses.'" App. A at 26a (quoting *Lehnert*, 500 U.S. at 519). The Third Circuit admitted that the unions neither met their burden of proof nor provided any evidence "that the payment [for the representation of healthcare professionals] is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." 500 U.S. at 524. Yet, it refused to reverse the district court and remand for entry of judgment for the Teachers.[26] Instead, the Third Circuit held, as a matter of law, that unions "may pool costs across occupational groups." App. A at 26a. That ruling ignores this Court's strict admonition in *Lehnert* that chargeability determinations require "a case-by-case analysis." 500 U.S. at 519.

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[26]The case was decided on cross-motions for summary judgment based on a stipulated record and request for "expeditious judicial resolution" "pursuant to the stipulated facts." App. B at 48a. Accordingly, there is no basis for a remand for further evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 39(a). If the party that has the burden of proof does not satisfy that burden on the stipulated record, then summary judgment is appropriate for the other party. 477 U.S. at 323; *see also* App. B at 47a.

When faced with a record inadequate to determine whether challenged activity "inured to the benefit of the members of the local union," *id.* at 524, the District of Columbia and Tenth Circuits, unlike the Third Circuit, reversed summary judgments in favor of the unions. In *Beckett*, 59 F.3d at 1279-80, the District of Columbia Circuit reversed a holding that a sympathy strike at another airline carrier inured to the benefit of the dissenters because the record did not reveal whether the "union's participation therein [was] intended merely to express solidarity with the primary striking union rather than to advance its own collective bargaining objectives." *Id.*

The Tenth Circuit in *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1517 (10th Cir. 1996), described the issue as whether "the Eastern strike assessment was designed to advance, and was reasonably likely to advance ALPA's own collective bargaining objectives at United." The court found the union's supporting evidence to be "simply too tenuous." "We read *Lehnert* as requiring more than the speculative nexus ALPA asserts." *Id.* at 1518. Accordingly, it reversed the judgment because the union's evidence was "inadequate" to support its burden, and remanded for entry of summary judgment for the objector on his statutory and constitutional claims. *Id.* at 1519.[27]

Two state supreme courts have also recognized that there must be supporting evidence and a finding that extra-unit costs may benefit the nonmembers' local unions. *Albro*, 585 N.E.2d

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[27] The Tenth Circuit also has held that a district court must "hold a hearing to determine which fees are attributable to bargaining-related expenses in the unit as distinguished from those which do not inure to the benefit of the local bargaining unit." *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1196 (10th Cir. 2002).

at 674; *Browne*, 485 N.W.2d at 387-88. *Albro* specifically found that *Lehnert*'s "inure to the benefit" language does not allow "*all* affiliation expenses [to be] chargeable." 585 N.E.2d at 674 (emphasis in original).

In fact, most courts of appeals that have allowed extra-unit expenses to be charged to nonmembers have done so because the district court or labor board made specific, detailed and exhaustive factual findings as to the beneficial relationship between the dissenters' bargaining unit and the extra-unit expenses. *Finerty v. NLRB*, 113 F.3d 1288, 1289, 1291-92 (D.C. Cir. 1997); *Crawford*, 992 F.2d at 1300, 1302-03; *PAID*, 938 F.2d at 1128.

In *Crawford*, Judge Wilkinson noted the lack of any rule-of-law holding in this area and observed: "In cases involving other industries [than the airline industry] and other unions, . . . such a factual including may not be present. In such circumstances, of course, application of *Lehnert* may very well result in a different outcome." 992 F.3d at 1303 n.1 (Wilkinson, J., concurring). Here, the Third Circuit upheld the chargeability of these extra-unit costs, as a matter of law, absent any evidence or factual findings. App. A at 25a-27a. It is the only court to do so.

Therefore, this Court should grant certiorari to review the Third Circuit's imposition of a general legal rule absent any factual findings that the union has met its burden of proof to show the beneficial relationship of the extra-unit representation of healthcare professionals to the Teachers' bargaining unit.

## IV. The Third Circuit's Decision That Pooling Costs Across Occupational Groups May Ultimately Inure to the Benefit of All of the Occupational Groups Conflicts with *Lehnert*'s Rule That "Bargaining Activities Wholly Unrelated to the Employees in Their Unit" Are Not Chargeable to Them.

The Third Circuit's holding, App. A at 26a-27a, that extra-unit expenses of affiliated unions may be chargeable to non-members without the union "demonstrat[ing] a direct and tangible impact upon the dissenting employee's unit," *Lehnert*, 500 U.S. at 524, erroneously establishes a general rule that swallows *Lehnert*'s exception. *Lehnert* held that the general rule as to extra-unit bargaining does not "grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Id.* at 524; *cf. Miller*, 108 F.3d at 1423 (refusing to extend the *Lehnert* exception that lobbying is chargeable in the limited context of contract ratification or implementation for public- sector unions because to do so would swallow the general rule of the nonchargeability of lobbying).

While this Court did not require proof of "a direct and tangible impact upon the dissenting employee's unit" for the chargeability of affiliated unions' extra-unit expenses, it, unlike the Third Circuit, did require "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524.

Ironically, this Court intended these comments to limit the chargeability of extra-unit expenses, not, as the Third Circuit and other courts interpret it, to expand immensely the chargeability of **all** extra-unit expenses. In addition to the Third Circuit's forcing Teachers to pay for the costs of the unions'

representation of healthcare professionals (across occupational groups), other courts have compelled subsidization of the costs of representing workers in: (1) other countries (Canada), *Machinists*, 133 F.3d at 1016; *Finerty*, 113 F.3d at 1289; and (2) other industries, *Finerty*, 113 F.3d at 1289. As we have shown, the Third Circuit's *per se* standard for the chargeability of all extra-unit expenses, including extra-unit litigation, is belied by the facts that: (1) *Lehnert* did not apply its extra-unit standard to all extra-unit expenses before it; and (2) the Third Circuit's holding does fundamentally alter the "germaneness" standard that the Court has used in all of its cases on these issues and that *Lehnert* explicitly adopted. *See also Crawford*, 992 F.2d at 1305-06, 1317-18 (Russell, J., dissenting).

## CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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